

The Crown has made it plain that this appeal is brought—not for the purpose of punishing the respondent but for the purpose of getting rid of doubts to which *Rex v. Tan Hoay* (*supra*) has given rise.

The appeal is allowed. The respondent did not know the dross was dross of non-Government chandu. He has been at the trouble and loss of twice attending this Court and we propose under all the circumstances to impose the purely nominal penalty of a fine of five cents.

TERRELL, AG. C.J. (F.M.S.)—I have had the advantage of reading the judgment of the learned President of the Court with which Horne J. concurs. I respectfully agree with this judgment, and the grounds upon which it is based, and only wish to add a few words.

It appears to me that exactly the same point arose in the case of *Ong Aik Phow v. Rex*, 6 M.L.J. p. 73 in which Whitley Ag. C.J. reviewed all the authorities which were cited to the Court on the present appeal. That was a case of importing rubber into the Colony in excess of the quantity authorised by the import permit, issued under the Rubber Regulation Ordinance 1934. It was held, that as the wording of the section indicated an absolute prohibition, it was unnecessary for the prosecution to prove *mens rea*. Whitley Ag. C.J. further held that where the importation had been established, it was not open to the accused to prove that he acted innocently. It is not therefore merely a question of shifting the onus.

In the later case of *Rex v. G. H. Kiat*, 7 M.L.J. p. 151, which arose in connection with the Rules made under the Quarantine and Prevention of Diseases Ordinance, I followed the decision of Whitley Ag. C. J., and held that the same principles applied, the prohibition being absolute. The decision of Whitley Ag. C.J. was in September 1936, and my decision in March 1938, and I consider it unfortunate that Crown Counsel, who quoted so carefully the relevant English authorities, had no note of the local decisions. It is also unfortunate that these decisions were not brought to the attention of Howes J. when the case of *Rex v. Tan Hoay*, (7 M.L.J. p. 216) came before him in September 1938. If these cases had been cited to him, the terms of his judgment might well have been modified, and the learned District Judge would not have felt compelled to acquit on account of dicta which were not in fact necessary to the decision in *Rex v. Tan Hoay*, with the result that the present appeal to a full Court need not have been brought.

I agree with the order proposed by the learned President of the Court.

HORNE, J.—I have read the Judgment of the Chief Justice and I agree with it.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

McELWAIN, C.J.

REX v. CHEONG KONG SENG.

[SINGAPORE MAGISTRATE'S APPEAL No. 97 of 1938]

Municipal Ordinance (Cap. 133), s. 211, sub-s. 1 (d).

Sect. 211, sub-s. 1 (d) of the Municipal Ordinance is intended to protect people from what the legislature has considered to be a nuisance caused by the burning of earth or lime by their neighbours whether the finished product is called a brick or a tile. If tiles are manufactured by a firing process by the burning of earth or lime an offence has been committed under the section.

MAGISTRATE'S APPEAL.

Dr. Withers-Payne for the Crown.

L. C. Chidson for Appellant.

Cur. Adv. Vult.

McELWAIN, C.J.—The respondent was charged with using his premises for the purpose of making bricks without first obtaining a licence from the Municipal Commissioners, contrary to section 211 (1) (d) of the Municipal Ordinance (Chapter 133).

The magistrate found as a fact (which was not controverted) that there was abundant evidence that the premises had been used for making tiles and that there was no evidence that they had been used for making bricks. As he was of opinion that the making of tiles was no offence under the section he acquitted the accused without calling upon him for his defence, without hearing Dr. Withers Payne and without waiting for Mr. Chidson to submit there was no case.

The Crown appealed and the Public Prosecutor authorised Dr. Withers Payne to conduct the appeal under section 402 (6) of the Criminal Procedure Code.

The section under which the respondent was charged, so far as immediately material, reads as follows:—

211 (1). No place shall be used within the Municipality for any of the following purposes:

- (d) making bricks, pottery or lime;
- (q) any other manufactory or place of business from which either offensive or unwholesome smells arise;
- (r) any purpose calculated to be dangerous to life or property;

except under a licence from the Commissioners."

The section proceeds to empower the Commissioners to make by-laws for the management and conduct of such businesses with a view to preventing or diminishing the noxious, injurious, offensive or dangerous effect thereof.

The evidence shews that on the dates laid in the charges the respondent had a circular beehive kiln capable of making either tiles or bricks. The kiln had fire in it and tiles were in process of being made from clay and stacked in the kiln for baking.

The prosecution evidence, unless contradicted, is quite sufficient to warrant a finding that the tiles were made of substantially the same material and by substantially the same method as those employed in the manufacture of bricks, and Dr. Withers Payne argued that the making of tiles is within the mischief of the section.

As Mr. Chidson pointed out there was no evidence specially directed to the question as to whether the making of tiles is a nuisance.

The prosecution case in short is that the legislature has decided that the manufacture of bricks is a nuisance and that therefore the manufacture of tiles from the same material and by the same methods is also a nuisance because the same fumes and smells are produced whether it is bricks or tiles that are being made.

From the evidence given the only substantial difference between bricks and tiles is one of shape and thickness.

Section 211 is the first section in Part X of the Ordinance and this part is headed "Sanitation and Prevention of Nuisances." The section is also the first of subgroup headed "Dangerous and Offensive Trades" and the marginal note to the section is to the same effect. It is unnecessary to rely on the marginal note though I have no doubt it can be invoked in aid for the reasons given by Terrell, J. in *Re Tan Keng Tin and Re Chop Soon Bee*, 1 M.L.J. at p. 135, (1933) S.S.L.R. at 363, (the reversal of this case by the Privy Council (1933) S.S.L.R. at 376 does not affect the point) to which I would add that in this Colony legislation has been passed amending marginal notes—see section 4 of the Passengers Restriction (Amendment) Ordinance 1932—and a little research would discover other examples—and the inference which may be drawn from the last clause of section 2 of the Criminal Procedure Code.

The intention of the section is clear from the headings and from its substance. It is not a section primarily to place obstacles in the way of

trade. It is a remedial section designed to protect persons from nuisances caused by dangerous and offensive trades carried on by their neighbours, and from a perusal of the subclauses of section 211 (1) it is clear that a trade which is either dangerous or offensive is within the mischief of the section. It is no less a remedial section because it imposes the sanction of a fine. Remedial statutes are to be liberally construed. *Huntinglover v. Gardineer*, 1 B. & C. 297. *Archer v. James*, 31 L.J., Q.B. at 168, so as to suppress the mischief and advance the remedy. Thus 'cattle' has been construed to include horses. *Wright v. Pearson*, L.R. 4 Q.B. 582, a "ship or vessel" to include an open boat 18 feet long. *R. v. Bowyer*, 4 C. & P. 559. A bicycle has been held to be included in the word "carriage" in an Act passed before bicycles were invented and therefore could not have been in the mind of Parliament. *Taylor v. Goodwin*, 4 Q.B.D. 228 because the Act was remedial. *William v. Ellis*, 49 L.J., M.C. 47.

Other illustrations, some drawn from penal statutes are referred to in *Maxwell on Interpretation of Statutes* 8 E. 240-245.

Mr. Chidson drew my attention to a passage at p. 248 "it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty." "Personal liberty" may be a two sided thing and includes the right of a person to enjoy his property without being hindered in that right by the invasion of his property by fumes and obnoxious smells.

In my opinion section 211 (1) (d) is intended to protect people from what the legislature has considered to be a nuisance caused by the burning of earth or lime by their neighbours and this nuisance is committed whether the finished product is called a brick or a tile.

Whether the clause would apply to the manufacture of bricks and tiles by a sundrying process which possibly does not involve the emission of noxious fumes and offensive smells is a question upon which it is unnecessary to express an opinion.

As the tiles in this case were being manufactured by a firing process, the evidence discloses an offence under the section.

This is not a decision that tiles are bricks. It is a decision that the production of certain fumes and smells is a forbidden nuisance and that that nuisance is the same in the one case as in the other and does not depend on the shape of the article the manufacture of which has produced that nuisance.